No. 90-872

In the Supreme Court of the United States

OCTOBER TERM, 1990

YELLOW BUS LINES, INC., PETITIONER

v.

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION 639, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the "person" named as the defendant under 18 U.S.C. 1962(c) may be identical to the "enterprise" whose affairs the person is alleged to have conducted through a pattern of racketeering activity.

2. Whether the phrase "to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs" in 18 U.S.C. 1962(c) requires proof that the defendant exercised control over the management or operation of the enterprise.

3. Whether a civil RICO plaintiff may include in an alleged "pattern of racketeering activity" under 18 U.S.C. 1962(c) acts of racketeering that are not directed at the plaintiff.

4. Whether the court of appeals' decision is consistent with Congress's direction to construe the provisions of RICO liberally to effectuate the statute's remedial purposes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Miscellaneous:

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Yellow Bus Lines, Inc. was a Virginia corporation providing bus service for schools in the District of Columbia. In November 1981, eight employees of Yellow Bus engaged in a four-day strike to gain recognition for the Drivers, Chauffeurs and Helpers Local 639 (Local 639) as the employees' collective bargaining representative. According to the company, the strikers engaged in threats and violence against company property with the encouragement of Local 639 and its business agent, James Woodward. After an incident in which Woodward allegedly threatened to "burn the company buses," Woodward was arrested and charged with crim-

inal offenses. On November 4, 1982, Woodward filed suit in the United States District Court for the District of Columbia against a police officer, the city, and three officers of Yellow Bus, alleging abuse of process and false arrest. The defendants in that action filed counterclaims, alleging malicious destruction of property and other tort claims. Pet. App. 46, 48-50, 105-106.

In April 1983, Yellow Bus also filed a complaint in district court against Local 639 and Woodward, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d), and requesting treble damages under 18 U.S.C. 1964(c).[1] In June 1984, the district court dismissed the RICO claims against Local 639. It reasoned that the complaint was defective in naming the union both as the "person" liable and the "enterprise" under RICO, thus violating a requirement that those entities be distinct. The court also denied petitioner's motion to amend the complaint to name Local 639 as the RICO "person" and Yellow Bus as the "enterprise." In October 1984, the district court granted summary judgment in favor of Woodward on the RICO claims against him because Yellow Bus had failed to allege a racketeering injury. Pet. App. 9-10, 12, 65-66; Br. in Opp. App. 13a, 19a.

Having disposed of the RICO claims, the district court proceeded to trial on the remaining state law claims.[2] The jury returned a verdict in favor of Yellow Bus, awarding a total of $133,200 for malicious destruction of

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[1] Under 18 U.S.C. 1962(c), it is unlawful "for any person employed by or associated with any enterprise * * * to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(d) prohibits conspiring to commit that offense. Pursuant to 18 U.S.C. 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter" may recover treble damages, costs, and attorney's fees.

[2] In May 1984, Woodward's false arrest claim was dismissed after he reached a settlement with the city. Pet. App. 50.

property, intentional interference with contractual relations, and abuse of process. In January 1986, the district court granted a motion by Woodward and the union for judgment notwithstanding the verdict, except as to the award of $1,280 against Woodward for malicious destruction of property. Pet. App. 50-51, 103-121.

2. On appeal, the court of appeals reinstated the malicious destruction of property claim against Local 639, but otherwise affirmed the judgment on the tort claims. It reversed, however, the district court's dismissal of the RICO claims. Br. in Opp. App. 2a-27a. With respect to the RICO claim against Woodward, the court of appeals noted that during the trial of this case, this Court decided *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), holding that a civil RICO plaintiff need not allege a separate "racketeering injury" that is distinct from the injury resulting from the predicate acts themselves. In light of *Sedima*, the court of appeals reversed summary judgment for Woodward and remanded for trial. Br. in Opp. App. 13a; Pet. App. 12-13, 69-70.

With respect to the RICO claims against Local 639, the court of appeals agreed with the district court that the original complaint's designation of Local 639 both as the "person" and the "enterprise" made the claim defective under Section 1962(c). Aligning itself with the majority view of the courts of appeals, the court held that the language of 18 U.S.C. 1962(c) and its underlying purpose require that the person and the enterprise be different entities. Br. in Opp. App. 14a-17a.[3]

The court of appeals disagreed, however, with the district court's refusal to permit Yellow Bus to amend its

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[3] The court also rejected Yellow Bus's contention that it could avoid the person-enterprise requirement by characterizing the enterprise as an "association-in-fact" consisting of Local 639 and Woodward. The court explained that "an organization cannot join with its own members to do that which it normally does and thereby form an enterprise separate and apart from itself." Br. in Opp. App. 18a.

complaint to allege itself as the "enterprise." The district court had thought that such an amendment would still fail to state a claim because Local 639 did not engage in the conduct of Yellow Bus's affairs; rather, the company was merely the "setting" for the union's strike activities. Br. in Opp. App. 19a. The court of appeals, however, determined that the requirement in 18 U.S.C. 1962(c) that the defendant "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" was satisfied here. The court explained that Section 1962(c) "refers to direct as well as indirect participation in the enterprise's affairs, and imposes no requirement that participation be at the management level or relate to 'core functions.'" Br. in Opp. App. 22a. Although the union did not play a role in Yellow Bus's management, it was alleged to have influenced the employee's strike for recognition of the union, and that "is an activity sufficiently related to the company's ongoing role as a business enterprise and employer to establish the requisite nexus." *Id.* at 24a-25a.

Finding that the predicate acts of racketeering charged in the complaint were sufficient to allege a "pattern,"[4] the court remanded for trial on the RICO claims after Yellow Bus had an opportunity to amend its complaint. Br. in Opp. App. 12a-13a, 27a.

3. On respondents' petition for a writ of certiorari, this Court vacated the judgment and remanded for further consideration in light of *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), which clarified the standards for demonstrating the existence of a "pattern" of racketeering activity under RICO. *Drivers Local Union No. 639* v. *Yellow Bus Lines, Inc.*, 492 U.S.

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[4] The court excluded from consideration alleged predicate acts of violent conduct that were not directed at Yellow Bus or connected to its labor dispute, but found that the remaining four predicate acts appeared to satisfy the "pattern" requirement. Br. in Opp. 12a-13a.

914 (1989). On remand, the court of appeals held (Pet. App. 96-98) that *H.J. Inc.* did not affect its conclusions with respect to the adequacy of the pattern alleged in this case; it therefore reissued its earlier opinion and reinstated the judgment in all respects. Pet. App. 45-102.

4. The court of appeals granted rehearing en banc to review the standard by which a person can be said to participate in the conduct of the enterprise's affairs under 18 U.S.C. 1962(c), and, in particular, to determine whether Local 639 could be alleged to have participated in the affairs of Yellow Bus as the enterprise. Pet. App. 6-7, 13-15.[5] After examining the various tests articulated by the courts of appeals, the court concluded that to participate in the conduct of the enterprise's affairs requires the defendant to exercise some significant control over the management or operation of the enterprise. *Id.* at 15-27. The word "[c]onduct," the court explained, "is synonymous with 'management' or 'direction'"; accordingly, "[i]n order to participate in the conduct of an enterprise's affairs, * * * a person must participate, to some extent, in 'running the show.'" *Id.* at 25-26. That level of participation would ordinarily require that the defendant take part in "directing the enterprise toward its preexisting goals" or in "exercising control over an enterprise so as to reset its goals." *Id.* at 26.

Applying its "management" test to the facts here, the court concluded that Local 639, "through its organizational efforts and the activities allegedly associated with its strike for recognition, did not conduct or participate in the conduct of Yellow Bus's affairs." Pet. App. 35. It therefore held that the district court correctly refused to allow Yellow Bus to amend its complaint to name itself as the Section 1962(c) enterprise. Pet. App. 37-38.

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[5] The en banc court left undisturbed the panel's conclusion concerning the requirement of nonidentity between the "person" named as the RICO defendant and the "enterprise" in the conduct of whose affairs the person has participated. Pet. App. 8-11.

DISCUSSION

Petitioners challenge two principal holdings of the court of appeals: first, that the person and enterprise named in a complaint under 18 U.S.C. 1962(c) must be distinct entities, and second, that to satisfy the requirement of "participat[ing] * * * in the conduct of [the] enterprise's affairs" under that section, a RICO defendant must participate in the management or direction of the enterprise in some fashion. As to the person-enterprise issue, all but one of the circuits agree with the decision below that the RICO statute requires a distinct "person" and "enterprise" in order to state a claim for relief under Section 1962(c). Although we continue to believe that the minority rule reflects the better reading of the statute, the majority rule has neither impeded the government's enforcement of RICO in criminal cases nor interfered with the operation of RICO in civil cases. Accordingly, we see no need for this Court to intervene at this time.

As to the issue of the defendant's participation in the "conduct" of the enterprise's affairs, we believe that the court of appeals erred in adopting a test that looks to whether the defendant managed or directed the enterprise, or participated in that function. Such an approach gives an unduly narrow meaning to the statutory language, undermines RICO's purpose to establish a forceful and effective remedy against all levels of organized criminal activity, and conflicts with the formulations articulated by other courts of appeals. But we do not suggest that the Court review this issue, which is important to the construction of RICO, in the present context. On the facts of this case, it is unlikely that petitioner would prevail under any circuit's "conduct" test. Moreover, although the test stated by the court of appeals has potential to give rise to difficulties in enforcing RICO, it is far from clear that those difficulties will materialize. As applied in particular cases, the court's somewhat elastic test may well be construed to produce results that are

fully consistent with those of other circuits. Finally, to the extent that labor law considerations influenced the court of appeals to find that the "conduct" requirement was not satisfied as to a striking union's relationship to a struck company, the precedential significance of the case is diminished. If this Court's intervention does become appropriate, a more characteristic RICO case would furnish a better vehicle for giving guidance to the lower courts. Accordingly, the petition should be denied.[6]

1. Petitioner initially contends (Pet. 13-16) that the court of appeals erred in adopting the rule that the "per-

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[6] Petitioner also presents two other questions that do not warrant review. Pet. ii. First, petitioner raises the issue of whether the court of appeals erred in excluding acts of racketeering not directed at Yellow Bus from the alleged "pattern of racketeering activity." The language to which petitioner refers in the court of appeals opinion (Pet. App. 67) does not necessarily imply, as petitioner believes (Pet. 26-27), that every predicate act alleged by Yellow Bus must cause injury to the plaintiff. A plausible reading of the court's statement is that some of the acts alleged were not sufficiently "related" to other predicate acts to form the requisite pattern. See Pet. App. 67. In any case, petitioner's objection is not squarely presented here because the court found four other predicate acts that it thought *did* adequately allege a pattern (*id.* at 67-68); its disregard of the other allegations is therefore irrelevant to the outcome, particularly since, as petitioner concedes (Reply Br. 7), Yellow Bus "cannot, of course, collect damages for acts injurious to others."

Second, petitioner suggests (Pet. 20-21, 27) that the court of appeals' holding is inconsistent with RICO's liberal-construction direction. 18 U.S.C. 1961 note. In our view, that issue does not independently warrant review, as the questions presented here can be satisfactorily resolved, as in other RICO contexts, by construing the statutory language and structure, and the legislative purposes revealed by the statute's background. See *United States* v. *Turkette*, 452 U.S. 576, 587 & n.10 (1981); cf. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) (suggesting that liberal-construction direction may apply only to remedies provided by RICO in 18 U.S.C. 1964). In any event, petitioner is wrong in contending (Pet. 20) that the court of appeals relied on a strict construction principle in ruling against it. The court made clear that the general rule that ambiguous penal statutes should be construed narrowly was "consistent" with but not "essential to our decision." Pet. App. 33.

son" and the "enterprise" alleged in a RICO suit may not be identical. All but one of the circuits considering that question require the defendant "person" and the "enterprise" whose affairs the person is alleged to have conducted through a pattern of racketeering to be different entities. See, *e.g.*, *Busby* v. *Crown Supply, Inc.*, 896 F.2d 833, 840 (4th Cir. 1990); *Puckett* v. *Tennessee Eastman Co.*, 889 F.2d 1481, 1488-1489 (6th Cir. 1989); *Saporito* v. *Combustion Engineering, Inc.*, 843 F.2d 666, 678 (3d Cir. 1988), vacated on other grounds, 489 U.S. 1049 (1989); *Garbade* v. *Great Divide Mining & Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987); *Bishop* v. *Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1986) (per curiam); *Schofield* v. *First Commodity Corp.*, 793 F.2d 28, 30-33 (1st Cir. 1986); *United States* v. *Benny*, 786 F.2d 1410, 1414-1416 (9th Cir.), cert. denied, 479 U.S. 1017 (1986); *Bennett* v. *United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), cert. denied, 474 U.S. 1058 (1986); *Haroco, Inc.* v. *American National Bank*, 747 F.2d 384, 399-402 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985); *Bennett* v. *Berg*, 685 F.2d 1053, 1061-1062, aff'd in pertinent part, 710 F.2d 1361 (8th Cir. 1982) (en banc), cert. denied, 464 U.S. 1008 (1983).

The Eleventh Circuit alone has ruled that the person and enterprise alleged under Section 1962(c) need not be distinct entities. In *United States* v. *Hartley*, 678 F.2d 961, 986-990 (1982), cert. denied, 459 U.S. 1170, 1183 (1983), the court concluded that nothing in RICO's language or legislative history precluded a corporation's dual role both as the defendant "person" and the subject "enterprise." Initially, the court noted that a corporation easily fits within the statutory definitions of both "person" and "enterprise." 18 U.S.C. 1961(3) states that " 'person' includes any individual or entity capable of holding a legal or beneficial interest in property." Section 1961(4) states that " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." In light of

the broad reading given the term "enterprise" by this Court in *United States* v. *Turkette*, 452 U.S. 576 (1981), the court concluded that the same entity can be at once the defendant and the enterprise. *Hartley*, 678 F.2d at 988. The court also relied on the incongruity that would result if an individual were the central figure in a crime ring, but could escape RICO liability while his underlings were held liable for associating with him; the existence of an alternative RICO charge in which a corporation and its employees collectively could be considered an "association-in-fact" enterprise and the corporation held liable as the defendant "person"; and the familiar corporate law distinction that treats a corporation both as entity (the RICO person) and, upon piercing the corporate veil, as aggregate of its agents (the RICO enterprise). *Id.* at 988-989.

The linchpin of the majority view is that Section 1962(c) requires the defendant person to be "employed by or associated with any enterprise"; courts have thought that this phrase contemplates a person who is distinct from the enterprise, and a relationship between the two. See *Haroco*, 747 F.2d at 400; *Schofield*, 793 F.2d at 30. Courts have also found difficulties in viewing a person as associating with himself. See Pet. App. 72; *McCullough* v. *Suter*, 757 F.2d 142, 144 (7th Cir. 1985). In addition, courts have argued that the RICO statute was intended to target the exploitation and infiltration of legitimate business by corrupt persons. When a legitimate business is the *victim* of the racketeering activity by its own employees, allowing the person and the enterprise to be identical would clash with that purpose by holding the victim liable for the acts of its unfaithful agents. *Haroco*, 747 F.2d at 401; *Schofield*, 793 F.2d at 30-31. On the other hand, when the corporation itself is reaping profits from racketeering activity, the corporation can be held liable under RICO's Section 1962(a), which prohibits the investment of racketeering proceeds in an enterprise; that provision does not contain language suggesting that the person and enterprise must be distinct. *Ibid.*; see also *Busby*, 896 F.2d at 840-841 & n.9

(ruling en banc that Section 1962(a), as opposed to Section 1962(c), does not require a distinct person and enterprise, and citing cases for that proposition from six other circuits).

Although the majority view is not without force, we believe that *Hartley*'s reasoning represents the better interpretation of the statute. The linguistic objections raised by the majority view are not ultimately persuasive. While the concept of being associated with oneself is not familiar usage, the concept of being self-employed certainly is, and fits well within the language of the statute. Although, in practice, violations of Section 1962(c) ordinarily involve a person (or entity) that has a relationship with a separate enterprise, in the case of an otherwise-legitimate business entity that is aggressively conducting structured criminal activity through its own agents, it fully accords with RICO's expansive language and objectives to apply Section 1962(c).

Nevertheless, we do not believe that the Court should review the person-enterprise issue in this case. It has long been the policy of the Department of Justice not to approve criminal RICO prosecutions naming the identical person and entity under Section 1962(c) except in extraordinary circumstances. Application of this policy has not hampered enforcement of RICO because, in virtually all cases, a corporation or other business organization that has affirmatively devoted itself to racketeering can be reached under RICO's Section 1962(a), which, as we have noted, has been construed not to require a separate person and enterprise. Moreover, in some settings, it is possible to charge the corporation as a defendant and as a member of an association-in-fact enterprise without running afoul of the person-enterprise rule under Section 1962(c). See *Alcorn County* v. *United States Interstate Supplies*, 731 F.2d 1160, 1168 (5th Cir. 1984) (defendant corporation, two of its employees, and a court clerk constituted RICO enterprise); *Cullen* v. *Margiotta*, 811 F.2d 698, 729-730 (2d Cir.), cert. de-

nied, 483 U.S. 1021 (1987).[7] And it is well established that an individual may be charged both as a defendant and as a member of an association-in-fact enterprise, in which case the defendant and the enterprise will not be identical. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 352-354 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988).

Nor does the separate-person-and-enterprise rule under Section 1962(c) appear to have impeded private use of RICO. Plaintiffs have enjoyed relative success in pleading claims that surmount that obstacle against entity defendants. See D. Smith & T. Reed, *Civil Rico* ¶ 3.07, at 3-62 (1990). If this Court were to reject the restriction, the benefits flowing to private RICO plaintiffs would be marginal at best.

Finally, this case presents a particularly poor candidate for review, because it appears doubtful that petitioner stands to recover even if permitted to proceed under RICO. Damages are available under RICO only if produced "by reason of" the violation, 18 U.S.C. 1964(c), and substantial evidence indicated that Yellow Bus suffered from serious internal difficulties and that those problems, rather than any union activities, caused its eventual collapse. Pet. App. 11, 51-65, 108-115. In addition, although the court of appeals found that petitioner has *alleged* a "pattern" of racketeering activity, it appears doubtful that petitioner can *prove* at trial a pattern that satisfies the requirement of continuity, or the threat of continuity, articulated by this Court in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, *supra*. The

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[7] But see *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir.) (enterprise consisting of bank, holding company, and three employees was not separate entity from defendant bank), cert. denied, 483 U.S. 1032 (1987); *Entre Computer Centers* v. *FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987) (defendant corporation could not be combined with its franchisees, or its officers and directors, to form a separate enterprise). Petitioner does not challenge the court of appeals' ruling here (Pet. App. 9-11, 78-81) that Local 639 and its business agent did not constitute a valid "association-in-fact" enterprise that was distinct from the union alone.

strike here lasted four days and occurred nearly a decade ago; the bus company is now out of business; and there is no suggestion that any "threat" of future strikes (let alone alleged racketeering acts) looms on the horizon. See *H.J. Inc.*, 492 U.S. at 242 ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this [continuity] requirement."). If review of the person-enterprise issue were warranted, it can await a case in which the issue appears to be more relevant to the outcome.

2. Petitioner also challenges (Pet. 16-18, 24-26) the court of appeals' gloss on RICO's requirement that the defendant have participated in the "conduct of [the] enterprise's affairs" through a pattern of racketeering activity in 18 U.S.C. 1962(c). The court determined that to satisfy this requirement, a defendant must have exercised some "significant control over or within an enterprise," which usually means engaging or participating in the "management or operation" of the enterprise. Pet. App. 26-27. We agree with petitioner that this formulation is incorrect and conflicts with the decisions of other courts of appeals, but do not believe that this case presents a suitable vehicle for review of the issue.

a. In considering the meaning of the "conduct" requirement, most courts of appeals that have addressed the issue have adopted varying formulations of the same general approach: they require some relationship between the affairs of the enterprise and the defendant's predicate acts of racketeering, but recognize that a coincidental or tangential connection between a person, a legitimate enterprise,[8] and the racketeering activity is not sufficient. For example, in *United States* v. *Scotto*, 641 F.2d 47, 54-55 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981), the court stated that "[s]imply committing predicate acts which are unrelated to the enterprise or

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[8] A legitimate business for this purpose is one, as the Court described it in *H.J. Inc.*, 492 U.S. at 243, that "is not a business that exists for criminal purposes." When the enterprise is wholly illegitimate, the connection of the predicate crimes to the enterprise's affairs is usually easy to establish.

one's position within it would be insufficient." But the court rejected more rigorous tests that would require the predicate crimes to relate to the "management or operation" of the enterprise, to affect its "essential functions," or to further the enterprise's affairs. Instead, the court stated that the "conduct" element is satisfied where "(1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise." 641 F.2d at 54. Two other circuits have followed the *Scotto* approach. *United States* v. *Provenzano*, 688 F.2d 194, 200 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); *United States* v. *Yarbrough*, 852 F.2d 1522, 1544 (9th Cir.), cert. denied, 488 U.S. 866 (1988).[9]

In *United States* v. *Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), the court articulated a somewhat different standard. Noting that Section 1962(c) requires a connection between the defendant, the racketeering activity, and the enterprise, the court stated that the "conduct" element entails a showing, where the enterprise is a legitimate business, that "(1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise." 706 F.2d at 1333. The test cannot be met where a defendant simply "works for a legitimate

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[9] The Second Circuit has consistently applied *Scotto*, see *United States* v. *Simmons*, 923 F.2d 934, 951 (1991) (collecting cases), without describing *how* the predicate acts must be "related" to the enterprise. But none of that court's cases has tolerated the type of happenstance relationship suggested in hypotheticals posited by the court of appeals (Pet. App. 18) in its criticism of the *Scotto* test. In *Scotto* itself, the defendant union official had received bribes and kickbacks from waterfront employers for using his influence to reduce inflated workman's compensation claims and to aid the employers in securing business. It appears that this is the type of "relatedness" that the Second Circuit had in mind, rather than the attenuated relationships in the hypotheticals posited by the court below. See also *Simmons*, 923 F.2d at 952.

enterprise and commits racketeering acts while on the business premises." *Id.* at 1332. Nor does "a defendant's mere association with a lawful enterprise whose affairs are conducted through a pattern of racketeering activity in which he is not personally engaged" violate RICO. *Ibid.* But the court took pains to note that establishing an "effect" on the enterprise is not a stringent requirement; it can be satisfied, for example, by the defendant's depositing of funds in the enterprise's bank accounts. *Id.* at 1332 n.24. *Cauble* has been adopted by two other circuits. *United States* v. *Ellison*, 793 F.2d 942, 950 (8th Cir.), cert. denied, 479 U.S. 937 (1986); *United States* v. *Pieper*, 854 F.2d 1020, 1026 (7th Cir. 1988).[10]

b. In our view, both the *Scotto* and *Cauble* formulations are consistent with the statute. Although employing different elements, the formulations reflect similar underlying policies and have not led courts to reach conflicting results in applying the requirement that the defendant "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." 18 U.S.C. 1962(c).

The D.C. Circuit's formulation, however, is a departure from the tests applied by the other circuits. Prior to the decision below, although a few opinions favorably discussed a "management" standard, no other court of appeals had firmly adopted one.[11] In rejecting the tests

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[10] The Eleventh Circuit declined to adopt or reject *Cauble* in a case where it was clear that the defendant's routine use of a legitimate enterprise's resources made "possible the racketeering activity." *United States* v. *Carter*, 721 F.2d 1514, 1527 & n.16, cert. denied, 469 U.S. 819 (1984). Other decisions of that court state that the predicate acts must be "helpful or necessary" to the operation of the enterprise, while making clear that involvement in the enterprise's activties "in a significant manner" is not demanded. *Bank of America* v. *Touche Ross & Co.*, 782 F.2d 966, 970 (1986) (accountants who allegedly certified false financial reports that facilitated a company's qualification for loans could be liable under RICO).

[11] The Eighth Circuit suggested in *Bennett* v. *Berg*, 710 F.2d at 1364, that "some participation in the operation or management of the enterprise itself" is ordinarily required, but in a later case it

applied in other circuits, the D.C. Circuit stated that its test was supported by the dictionary, which defines "conduct" to be "synonymous with 'management' or 'direction.'" Pet. App. 25, quoting *Webster's Third New International Dictionary* 473 (1961). But the court's "plain language" analysis is far too restrictive. It is generally recognized that persons who take part in carrying out the activities of an enterprise without managing it or directing its goals still "conduct" the enterprise's activities. For example, the definition of "conduct" in 3 *Oxford English Dictionary* 691 (2d ed. 1989) includes the meaning, "To direct, manage, carry on (a transaction, process, business, institution, legal case, etc.)," but pointedly adds: "The notion of direction or leadership is often obscured or lost; e.g. an investigation is *conducted* by all those who take part in it." [12] Giving RICO's terms their "ordinary meaning," *Russello* v. *United States*, 464 U.S. 16, 21 (1983), the term "conduct" does not entail the court of appeals' limitation that a person must participate in "running the show." Pet. App. 26. Indeed, a "management" or "significant control" limitation on the term "conduct" reads words into the statute that

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endorsed the Fifth Circuit's *Cauble* standard. *United States* v. *Ellison, supra.* The Fourth Circuit indicated similar views in *United States* v. *Mandel*, 591 F.2d 1347, 1375 (1979), vacated on other grounds, 602 F.2d 653, cert. denied, 445 U.S. 961 (1980), but that court since noted that "the *Mandel* opinion is not binding upon us," *United States* v. *Webster*, 639 F.2d 174, 185 (1981), modified, 669 F.2d 185, cert. denied, 456 U.S. 935 (1982), and it upheld a RICO conviction where the defendants' participation in the conduct of the enterprise's affairs consisted of using a club's telephone, facilities, and personnel to facilitate narcotics transactions, *Webster*, 669 F.2d at 187—a holding that implicitly rejects a strict "management" approach.

[12] To same effect is *Webster's Dictionary of Synonyms* 184 (1942) (emphasis added) which states that "[c]onduct may imply the act of an agent who is both the leader and the person responsible for the acts and achievements of a group having a common end or goal * * *, *but often the idea of leadership is lost or obscured, and the stress is placed on a carrying on by all or by many of the participants.*"

"appear[] nowhere in the language or legislative history" of RICO. *H.J. Inc.*, 492 U.S. at 240-241 (rejecting "multiple scheme" limitation on "pattern" requirement because of lack of support in the statute or legislative materials).

More fundamentally, the court failed to give heed to "the pattern of the RICO statute in utilizing terms and concepts of breadth." *Russello*, 464 U.S. at 21; see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. at 497-498 ("RICO is to be read broadly" in accordance with "Congress' self-consciously expansive language and overall approach"). Congress would hardly have made it unlawful to "conduct" *or* "participate directly *or* indirectly, in the conduct of" the enterprise's affairs if it had wanted to impose a narrow rule reaching only those who had attained some "significant" level of control over the management or operation of an enterprise.[13] Rather, "Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. at 248-249.

The court claimed that its "management" standard best furthers RICO's goal of prohibiting the illegitimate "acquisition or operation of business," Pet. App. 28 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 76, 81 (1969)), while preventing interference with the existing framework of law governing other fields. Pet. App. 30. But far from fulfilling Congress's goals, the court's standard is at odds with RICO's purpose to protect legitimate businesses against infiltration at all levels.[14] RICO

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[13] Congress is quite familiar with language that restricts a statute's reach to the leaders or managers of an enterprise. See 21 U.S.C. 848(b) (prescribing penalties for "[a]ny person who engages in a continuing criminal enterprise * * * if—(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal organizers, or leaders").

[14] The legislative history on which the court chiefly relied, S. Rep. No. 617, *supra*, at 81, explained the need for civil remedies analogous to divestiture in the antitrust field; it did not comment on

prohibits not only the acquisition of an interest in an enterprise with racketeering proceeds (Section 1962(a)), and the use of illegitimate means to gain an interest in or control over an enterprise (Section 1962(b)), but also the corruption of an enterprise that can occur when it is conducted through a pattern of racketeering activity (Section 1962(c)); in the last setting, even criminal actions far below the level of senior management can yield significant profits to wrongdoers and thwart the attainment of the enterprise's legitimate goals. For example, outsiders who assist the enterprise to commit crimes, use its resources for criminal purposes, or influence its actions by the payment of kickbacks to subordinates, surely "participate * * * in the conduct" of its affairs through the prohibited pattern, even though not significantly controlling its overall goals. The courts have consistently construed RICO to reach that sort of misconduct.[15]

Section 1962(c)'s coverage. Indeed, in its section-by-section analysis of the bill, the Report makes clear that to trigger the application of Section 1962(c), no minimal "percentage" of the enterprise's activities need be affected by racketeering. Unlike subsection (a), which provides an exception to the prohibition against investing funds derived from racketeering activity into an enterprise "where there is no resulting control in law or in fact to the investor," subsection (c) applies to *any* "conduct of the enterprise through the prohibited pattern"; "there is no limitation on the prohibition." S. Rep. No. 617, *supra*, at 159.

[15] See, *e.g.*, *United States* v. *Roth*, 860 F.2d 1382, 1390 (7th Cir. 1988) (lawyer who bribed judges participated in the conduct of the court's affairs), cert. denied, 490 U.S. 1080 (1989); *United States* v. *Horak*, 833 F.2d 1235, 1239 (7th Cir. 1987) ("'conduct' in section 1962(c) does not mean 'control' or 'manage'"; employee of subsidiary participated in the conduct of parent company by fraudulently procuring contracts for the subsidiary, which financially benefitted the parent); *United States* v. *Yonan*, 800 F.2d 164, 168 (7th Cir. 1986) (defense attorney who attempted to bribe prosecutor to influence the disposition of cases participated in the conduct of affairs of state's attorney's office), cert. denied, 479 U.S. 1055 (1987); *United States* v. *Jannotti*, 729 F.2d 213, 226-227 (3d Cir.) (city councilman participated in the conduct of a law firm's affairs by accepting bribe to facilitate approval of transaction from which

RICO's major purpose is to eliminate the "infiltration of organized crime and racketeering into legitimate organizations." S. Rep. No. 617, *supra*, at 76. Such "infiltration" can take place gradually, and perniciously, long before it reaches the corporate boardroom. Accordingly, because "the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise," *United States* v. *Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978), a "conduct" test limited to those who exercise significant control over the enterprise cannot be reconciled with RICO's objectives.

c. Although the formulation applied by the court in this case departs from the approaches devised by the other courts of appeals, we do not believe that it presently warrants this Court's review. To begin with, only one other court of appeals has considered whether a union participated in the conduct of a company's affairs through strike violence, and that court rejected the application of RICO under the *Cauble* standard. *Overnite Transp. Co.* v. *Truck Drivers Local No. 705*, 904 F.2d 391, 393-394 (7th Cir. 1990) (holding that union's relationship to the company did not facilitate its commission of predicate acts). Review is not justified here to clarify a legal standard that would likely not aid petitioner in any event.

More importantly, the implications of the D.C. Circuit's test are murky. The court of appeals stated that its construction of the statute still allows for RICO liability of outsiders as well as insiders; the crucial issue is "whether and to what extent that person controls the course of the enterprise's business." Pet. App. 27. The court also appeared to accept the view that a RICO defendant need not advance the enterprise's affairs through

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the law firm stood to benefit by representing the bribe payer), cert. denied, 469 U.S. 880 (1984); *United States* v. *Watchmaker*, 761 F.2d 1459, 1475-1476 (11th Cir. 1985) (defendants participated in the conduct of motorcycle gang's affairs by engaging in a few acts of drug dealing and extortion with and at the behest of gang members), cert. denied, 474 U.S. 1101 (1986).

the predicate crimes, or receive the enterprise's authorization to conduct them. *Id.* at 17-18. Accordingly, despite the court's efforts to articulate an intelligible standard, it is difficult to foresee how the court will apply its "control-over-the-management-or-operation" test on other facts. For example, if presented with a contractor's payment of bribes to a government employee to influence official action, the court may well find the requisite degree of "control" over the enterprise's "operations"; if so, the D.C. Circuit's conduct standard may, in practice, converge with that of other courts of appeals. Absent application of the court's approach in concrete factual settings, we are uncertain that the principle announced below will lead to results warranting review by this Court.

Further undermining the need for review is the fact that the result here appears to be colored by labor law considerations not relevant in the typical RICO case.[16] From a labor perspective, it is somewhat counterintuitive to label a union as participating in the conduct of the company's affairs through engaging in a recognition strike. To be sure, in applying the economic leverage of a strike, a union seeks to advance its members' interests by affecting how management conducts the company's affairs: *i.e.*, whether management will recognize the union or accede to its demands. But the same is true with respect to typical contract negotiation between the company and, say, a supplier. The supplier applies such economic leverage as it can to advance its interests by affecting how management conducts the company's affairs: *i.e.*, what prices management will pay for the supplier's goods. Yet the latter situation, without more, has never been understood as satisfying RICO's "conduct" requirement.

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[16] The court of appeals was clearly troubled by the possibility that if RICO applied in this case, it might also apply in innumerable other labor-management clashes, thus effecting a complete reworking of federal labor law. Pet. App. 30-33. To the extent that this concern influenced the court's analysis, the usefulness—and scope—of the test the court fashioned to decipher the "conduct" requirement may well be limited.

RICO, of course, does apply to strike violence if the elements of the statute are otherwise satisfied, see *United States* v. *Thordarson*, 646 F.2d 1323, 1329-1331 (9th Cir.), cert. denied, 454 U.S. 1055 (1981). Indeed, the court of appeals allowed petitioner's RICO claim to stand against the business agent of Local 639, who was alleged to have conducted the affairs of the *union* through a pattern of racketeering. Pet. App. 37. But at least on the facts alleged here, the economic antagonism between the struck company and the union supporting a recognition strike diverges from the type of infiltration of, or involvement in, an enterprise that lies at the base of RICO's "conduct" requirement.

Because the "conduct" requirement, like other RICO elements, may be satisfied "in a variety of ways, * * * it [is] difficult to formulate in the abstract any general test." *H.J. Inc.*, 492 U.S. at 241. This unusual case, if anything, exacerbates those difficulties. In our view, if the Court were to fashion a general test for the "conduct" requirement and then apply that test to a specific case, it would give better guidance to the lower courts if the case selected for review presented a more characteristic application of RICO than is presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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